

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Marcos P.,

Claimant,

and

South Central Los Angeles Regional Center,

Service Agency.

OAH No. L 2007030940

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on May 11, 2007, in Los Angeles, California.

Claimant's adoptive mother, Betty McCrady, represented Claimant.

Michael W. Monk and Susannah J. Monk, Attorneys at Law, represented Service Agency.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

ISSUE

Whether Service Agency may re-assess Claimant's level of care needs from Level 4 under the Alternative Residential Module (ARM) to Level 3 ARM, for the purpose of setting an Adoption Assistance Program (AAP) Rate.

FACTUAL FINDINGS

1. Claimant, a boy born on September 6, 1997, is a Service Agency consumer with qualifying diagnoses of autism, cerebral palsy, and mental retardation. He also has a seizure disorder. He resides with his adoptive parents and younger brother.

2. Claimant does not walk on his own, and relies on a wheelchair. He can walk short distances if held and guided. He does not say any words, but does make vowel-like utterances. He has hearing impairment and visual impairment in the right eye.

3. Claimant does not perform any daily living activity on his own. His adoptive mother provides for all his personal needs. He does not eat solid foods and opens his mouth when food is presented. He does not drink from a cup on his own, but tries to hold a sippy cup. He is incontinent and wears diapers, but does not let anyone know when the diaper is wet or soiled.

4. Claimant engages in self-stimulatory behavior. The records and testimony submitted at the hearing describe movement of the head from side to side, rocking, snapping of teeth. He has also occasionally hit himself, at times in a repetitive fashion, and often as a way to express frustration.

5. Claimant attends a very structured special day class at an elementary school in the Lynwood Unified School District (District). His most recent Individual Education Plan (IEP) is dated January 18, 2006, and was updated December 13, 2006, and January 23, 2007. He receives the assistance of a 1:1 aide. Teachers and other instructors are working on the following basic goals: identifying objects, with prompts; sorting blocks by color; playing simple games with physical assistance; catching a ball with full physical assistance; and increasing involvement in self-feeding.

6. The District implemented a Behavior Support Plan on January 23, 2007. The following behaviors were reported in the IEP addendum: head-banging one to six times per day; mildly aggressive acts; uncooperative behaviors, such as refusing to perform disliked tasks, one to ten times per day; disruptive behaviors, such as crying, one to four times per day; destruction of school property, such as trying to push computers off the desk, once per week; and rocking one to ten times daily. The plan calls for use of a helmet, redirection techniques, and constant monitoring.

7. Carol Kelly, Ed.D. (Kelly), performed a psychological evaluation on December 5, 2006, at the request of Service Agency. Dr. Kelly unsuccessfully attempted to administer the Leiter International Performance Scale-R and the Picture Vocabulary Test-III. With Claimant's adoptive mother as the reporter, Dr. Kelly administered the Vineland Adaptive Behavior Scales-II (Vineland), and concluded that Claimant's adaptive deficits were in the severely delayed range (Communications), moderately delayed range (Daily Living Skills), and severely delayed range (Socialization). Dr. Kelly described Claimant's cognitive delays in the profound to severe range of mental retardation. He did not display any disruptive or aggressive behaviors during the evaluation. Dr. Kelly noted his mother's report of lip-biting, rocking, and self-hitting in the neck, which was resolved after behavioral intervention. In Dr. Kelly's opinion, Claimant requires one-on-one monitoring in all situations because of health and safety concerns.

8. Claimant receives assistance from the County of Los Angeles Department of Children and Family Services (DCFS) through the AAP program. The AAP program is intended to provide assistance in the adoption of children with special needs. For children who are regional center consumers, the level of financial assistance is established based on the ARM, or the cost of housing the child in an institution. On October 15, 2002, pursuant to Department of Social Services (DSS) regulations, DCFS asked Service Agency for a determination of the ARM rate for Claimant. On October 18, 2002, Claimant's prior service coordinator, Patricia A. Blackmon, informed DCFS that, based on his care needs, Claimant would be eligible for placement in a Level 4B facility.

9. In 2004, DCFS made a new request for an ARM rate determination. In order to prepare a response, Service Agency consultant Bruce Williams, Ph.D. (Williams), reviewed the Client Development Evaluation Report (CDER), the most recent individual program plan (IPP), the most IEP, and available psychiatric evaluations and treatment records in Claimant's file. The CDER Frankland Factor was 19, which suggested a moderate level of significant behavior and emotional problems. The most recent psychological evaluation reported that previously identified behaviors, such as head-banging, non-compliance, screaming, and self-abuse, were no longer problems. There were no reported behavior problems at school. Dr. Williams referred to his own progress note of a visit to Claimant's home in February 2003, in which Dr. Williams observed self-stimulatory and mild self-abusive behaviors, which were reportedly minimized with recommended techniques. In light of the improved behavior, Dr. Williams concluded that the appropriate ARM rate was that of a Level 3 facility, not that of the previously-rated higher Level 4B facility. Despite Dr. Williams' conclusion, Claimant continued to receive an AAP payment based on the Level 4B ARM rate.¹

10. On February 6, 2007, DCFS again requested an ARM rate determination from Service Agency.

11. Dr. Williams reviewed the pertinent file records, including updated CDER, IEP, and Dr. Kelly's psychological evaluation. Dr. Williams noted that the Frankland Factor on the CDER was now 11, a decrease in behavior problems; he interpreted the new figure as indicative of a low-moderate level of significant behavioral and emotional problems. Dr. Williams found significant, as stated in Dr. Kelly's psychological evaluation report, that behavioral intervention had stopped Claimant's hitting himself hard in the neck. However, Dr. Williams further noted that Claimant continued to wear a helmet at school because he banged his head one to six times per day. School documents also reported property abusive behavior (pushing a computer), unspecified disruptive behavior, rocking one to ten times per day, and showing little interest in activities. Dr. Williams relied on the IPP's report of mild self-stimulatory behaviors, namely,

¹ Neither Claimant's mother nor Service Agency presented any evidence regarding the reason(s) Claimant's AAP payment was not adjusted. If Service Agency replied in writing to DCFS, its letter was not submitted in evidence.

hitting his legs when angry and head-banging. Dr. Williams concluded that the behavior problems, which showed improvement, were significant, but not severe. He recommended a Level 3 ARM rate.

12. Cecilia Pannell-Atkins, R.N. (Pannell-Atkins), performed a nursing assessment of Claimant on February 14, 2007. The assessment had been requested by Service Agency to evaluate respite needs. Claimant sat in a couch and consistently rocked back and forth and snapped his teeth, except for one occasion in which his adoptive mother had to walk him to the restroom. On examination, the nurse noted limited fine and gross motor movement in his upper and lower extremities. Pannell-Atkins did not observe any aggressive behavior during the one-hour visit.

13. At Claimant's mother's request, Dr. Williams reviewed the nurse assessment report to determine if any information warranted a change in his recommendation of a Level 3 ARM rate. The assessment did not change his opinion, as Claimant did not engage in any behavior he would deem severe, such as aggression toward others.

14. On February 14, 2007, Service Agency provided a written reply to DCFS, informing the County agency that Claimant had been assessed at a Level 3 ARM rate. It informed DCFS that Level 3 facilities approximated a homelike setting, but with a structured environment and staffing sufficient to meet Claimant's intensive need for supervision.

15. A Notice of Action dated March 13, 2007, from DSS was received in evidence. The document stated that Claimant's AAP rate would be decreased to that consistent with a Level 3 ARM determination. It was not established whether the reduction was actually implemented.

16. Service Agency issued its Notice of Proposed Action on February 28, 2007, and Claimant's mother thereafter filed a fair hearing request, received by Service Agency on March 14, 2007.

LEGAL CONCLUSIONS

1. DSS has promulgated AAP regulations as part of its Adoption Program Regulations. (Cal. Code Regs., tit. 22, § 35325 et seq.) The purpose of AAP is to remove or reduce barriers to the adoption of children who otherwise would remain in long-term foster care. (Cal. Code Regs., tit. 22, § 35325). The actual amount of the incentive payment is negotiated between the responsible public agency, DCFS in this case, and the adoptive parents in accordance with a process established by DSS. (Cal. Code Regs., tit. 22, § 35333).

2. DCFS is required to determine the maximum AAP benefit for which a child is eligible, a sum equal to the difference between the state-approved foster care maintenance payment, plus any applicable special care supplements, that a child would have received if he/she had remained in foster care, less any income received by or on behalf of the child. (Cal. Code Regs., tit. 22, § 35333, subd. (c).) If the foster child is also a regional center consumer, then “the maximum rate shall be the foster family home rate formally determined for the child by the Regional Center using the facility rates established by the California Department of Developmental Services. . . .” (Cal. Code Regs., tit. 22, § 35333, subd. (c)(1)(C).)

3. The Department of Developmental Services (DDS) facility rates referred to in the cited DSS regulation are found at California Code of Regulations, title 17, section 56001 et seq. Levels 3 and 4 facilities are intended to serve consumers with greater service needs. (Cal. Code Regs., tit. 17, § 56013.) Level 3 facilities are those designed to serve consumers with: “[A)] Significant deficits in self-help skills; and/or (B) Some limitations in physical coordination and mobility; and/or (C) Disruptive or self-injurious behavior.” (Cal. Code Regs., tit. 17, § 56013, subd. (c).) Level 4 facilities are those designed to serve consumers with: “[A)] Severe deficits in self-help skills; **and/or** (B) Severe impairment in physical coordination and mobility; **and/or** (C) Severely disruptive or self-injurious behavior.” (Cal. Code Regs., tit. 17, § 56013, subd. (d).) (Emphasis Added.)

4. Claimant’s needs are more in line with the services provided at a Level 4 facility, by reason of factual finding numbers 1 through 13. His deficits in two of the three qualifying criteria, self-help skills and physical coordination and mobility, are severe. Thus, he cannot perform any self-care activity and must rely on a wheelchair or his adoptive parents to move more than a short distance. Claimant’s inability to verbally communicate his needs add to the challenge of providing for his basic care and hygiene needs. His propensity for self-injurious behavior is a concern and the head-banging is significant and continuing. While Service Agency is correct to point out that Claimant’s significant disruptive and self-injurious behavior do not presently rise to the severe level, Claimant does not need to show a severe level of impairment in all three pertinent criteria; all he needs to have is one severe deficit or impairment, not three, as the disjunctive “and/or” separating each qualifying criterion indicates. Accordingly, Claimant’s deficits and limitations in two areas remain at the severe level, and continued Level 4 ARM designation is warranted.

ORDER

1. Claimant's appeal is sustained.

2. Service Agency shall issue a new Rate Letter designating Claimant as requiring services at Level 4 under the ARM.

3. Claimant shall be made whole for any loss of AAP benefits resulting from Service Agency's recommendation that the AAP benefits be based on the Level 3 ARM rate instead of the preexisting Level 4 ARM rate. If DSS refuses to make Claimant whole, then Service Agency shall be responsible for any shortfall.

Dated:_____

/s/_____
Samuel D. Reyes
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.